NO. 85591-9

SUPREME COURT
OF THE STATE OF WASHINGTON

LYNETTE KATARE,

Respondent,

v.

BRAJESH KATARE,

Petitioner.

CONSOLIDATED ANSWER OF PETITIONER TO BRIEFS OF *AMICI CURIAE*

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I. INTRODUCTION

As both amici have noted, the admission of profiling evidence impermissibly suggested that because of his ancestry Brajesh Katare had a propensity to commit the crime of child kidnapping. *Korematsu Center Amicus Brief*, at 1; *ACLU of Washington Amicus Brief*, at 6-8. Profiling people as more likely to commit certain crimes because of their country of national origin is, unfortunately, nothing new. For example, in *Hirabayashi v. United States,* 320 U.S. 81 (1943) and *Korematsu v. United States,* 323 U.S. 214 (1944), the entire justification for subjecting persons of Japanese ancestry to a curfew and then to exclusion from sections of the west coast of the United States, was the speculative belief that because of their attachment to Japan and Japanese culture, they were more likely to commit the crimes of espionage and sabotage.[1] The military authorities noted that Japanese-Americans often sent their children "to Japanese language schools outside the regular hours of public schools" and that these schools were "generally believed to be sources of Japanese nationalistic propaganda, cultivating allegiance to Japan."[2] The Supreme Court concluded that the Executive Branch could reasonably take these cultural ties into account when determining the extent of the danger of espionage and sabotage.[3] In dissent, Justice Murphy opined that neither

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[1] "[E]xclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country." *Korematsu*, 323 U.S. at 218-19.

[2] *Hirabayashi,* 320 U.S. at 97.

[3] *Hirabayashi*, 320 U.S. at 98-99.

reason, logic, nor experience provided any support for the simple assumption that persons with of Japanese ancestry would be more likely to commit these crimes.[4] Justice Murphy condemned the unfounded notion that an appreciation of a foreign culture would lead citizens to commit crimes of sabotage more than other American citizens who had no such ties to another country:

> Individuals of Japanese ancestry are condemned because they are said to be "a large, unassimilated, tightly knit racial group, bound to an enemy nation by strong ties of race, culture, custom and religion." They are claimed to be given to "emperor-worship" and to "dual citizenship." Japanese language schools and allegedly pro-Japanese organizations are cited as evidence of possible group disloyalty, together with facts as to certain persons being educated and residing at length in Japan.

Korematsu, 323 U.S. at 237-38 (Murphy, J., dissenting).

Roughly four decades later, based on historical research[5] which revealed documents previously concealed from the Justice Department by the War Department,[6] Hirabayashi's convictions were vacated based on the new evidence which showed that the military curfew and exclusion orders "were based upon racial stereotypes." *Hirabayashi v. United*

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[4] *Korematsu*, 323 U.S. at 235 (Murphy, J., dissenting).

[5] Peter Irons located the sole remaining copy of the original report prepared by General John L. DeWitt, the Commanding General of the Western Defense Command and the general who issued the curfew and exclusion orders. See P. Irons, *Justice at War* (1983) and *Hirabayashi v. United States*, 828 F.2d 591, 593 (9th Cir. 1987)

[6] "The War Department tried to destroy all copies of the original report when the revised version was prepared. [The] record contains a memo by Theodore Smith of the Civil Affairs Division of the Western Defense Command, dated June 29, 1943, certifying that he witnessed the burning of 'the galley proofs, galley pages, drafts and memorandums of the original report of the Japanese Evacuation." 828 F.2d at 598.

States, 828 F.2d 591 (9th Cir. 1987).[7] Today, the wartime treatment of Japanese-Americans based on national origin profiling is an embarrassing blot on our nation's history.

In the present case, similar culturally and racially biased stereotypes are at work, which have led the United States Justice Department to profile parents with strong ties to another culture as more likely to commit the crime of child abduction. The Department asserts that parents who "have strong ties to their extended family in their country of origin have long been recognized as potential [child] abductors." *Tr. Exhibit No. 28, Profile 5.* The Department contends that divorcing parents from other countries "who idealize their own family, homeland, and culture" and who are ending "mixed culture" marriages "are at risk of becoming abductors." *Tr. Exhibit No. 33,* at 5. But just as strong ties to the culture of another country are not accurate predictors of espionage and sabotage when we are at war with that country of origin, neither are they accurate predictors of child abduction, when parents in racially or culturally mixed marriages get divorced.

The Court below correctly recognized that it was an abuse of discretion to admit this type of profiling evidence. But while it found error, it failed to recognize the constitutional dimensions of this error, and failed to purge the judicial system of the taint of having admitted it. While the amici have correctly identified the error as a type of denial of the

[7] The general who issued these orders was quoted as stating, "It makes no difference whether the Japanese is theoretically a citizen . . . A Jap is a Jap." *Id.* at 601.

constitutional guarantee of equal protection under the Fourteenth Amendment, they have shied away from embracing a structural error approach to judicial correction of the error. Instead, the ACLU classifies this type of error as one affecting the judicial integrity of the court system, and the Korematsu Center calls for rigorous application of the constitutional harmless error test. Both call for reversal of the decision below, and for the elimination of the restrictions which the Superior Court placed upon the father's ability to take his children with him to India.

The father agrees with this ultimate conclusion, but respectfully suggests that the most direct and most appropriate way to classify the error which mandates this reversal is to recognize that when evidence which endorses racial or national origin discrimination has been admitted at trial, in all cases, civil and criminal, it is necessary to apply a per se rule of reversal. It is precisely because the exact effects of invidious discrimination are so hard to evaluate that such an approach is required. Without such a per se rule, the citizens of this State cannot and will not have faith that their judicial system is free from unconstitutional discrimination; and they will be right.

II. ANSWER TO THE AMICUS CURIAE BRIEFS

A. Structural Error Analysis Is Proper in Civil Cases as Well as in Criminal Cases, Particularly When the Error Involves Discrimination on the Basis of Race or National Origin.

1. Racial Discrimination in the Administration of Justice Has Never Been Susceptible to Harmless Error Analysis.

The Supreme Court has never treated racial discrimination in the conduct of a trial as something amenable to harmless error analysis. For

example, when faced with racial discrimination in the selection of a grand jury, the Court held that this type of constitutional error could not be cured and could never be deemed harmless:

> Once having found discrimination in the selection of a grand jury, we simply cannot know that the need to indict would have been assessed in the same way by a grand jury properly constituted. ***The overriding imperative to eliminate this systemic flaw in the charging process, as well as the difficulty of assessing its effect on any given defendant, requires our continued adherence to a rule of mandatory reversal.***

Vasquez v. Hillery, 474 U.S. 254, 264 (1986) (emphasis added).

Similarly, a racially motivated exclusion of a potential juror is another type of constitutional violation which is not susceptible to harmless error analysis. In *Batson v. Kentucky,* 476 U.S. 79 (1986), a criminal case, the Court noted that the exclusion of an African American juror because of his race caused a trifecta of constitutional violations by violating the equal protection rights of both the defendant and the excluded juror, and by "undermin[ing] public confidence in the fairness of our system of justice." The *Batson* Court bluntly said that once such purposeful racial discrimination was shown, "our precedents require that petitioner's conviction be reversed." *Id.* at 100. Recently, in *Rivera v. Illinois*, 556 U.S. 148, 129 S. Court. 1446 (2009), the Court distinguished between jury selection errors which did not involve claims of race discrimination and other kinds of jury selection errors such as the error committed in defendant Rivera's case. Only race discrimination error triggered an automatic rule of mandatory reversal:

> The automatic reversal precedents Rivera cites are inapposite. One set of cases involves *constitutional* errors concerning the

> qualification of the jury or judge. In *Batson* for example, we held that the unlawful exclusion of jurors based on race requires reversal because it "violates a defendant's right to equal protection," "unconstitutionally discriminate[s] against the excluded juror," and "undermine[s] public confidence in the fairness of our system of justice."

Rivera, 129 S. Ct. at 1455, citing *Batson*, 476 U.S. at 86, 87. Because this type of error injected racial bias into the jury box, mandatory reversal was required and harmless error analysis was simply not permitted. Such an error is considered structural because

> As our recent decisions make clear, we typically designate an error as "structural," therefore "requir[ing] automatic reversal," only when "the error 'necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.'" [Citations omitted]. The mistaken denial of a state-provided peremptory challenge does not, at least in the circumstances we confront here, constitute an error of that character.

Rivera, 129 S. Ct. at 1455.

2. The Supreme Court Has Applied the Same Rules in Both Civil and Criminal Cases.

As *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) illustrates, *the same rule applies to civil cases where purposeful race discrimination infects the judicial process.* "Recognizing the impropriety of racial bias in the courtroom," the Court said: "we hold the race-based exclusion violates the equal protection rights of the challenged jurors." *Id.* at 616. The Court *refused* to distinguish between criminal and civil cases. The Court acknowledged "a century of jurisprudence dedicated to the elimination of race prejudice within the jury selection process" and noted:

> While these decisions were for the most part directed at discrimination by a prosecutor or other government officials in the context of criminal proceedings, ***we have not intimated that race discrimination is permissible in civil proceedings.***

Edmonson, 500 U.S. at 618 (emphasis added). Even though the discrimination in *Edmonson* was practiced by a private litigant, the Court went on to hold that such discrimination violated equal protection and caused serious harm to the administration of civil justice:

> Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality.

Edmonson, 500 U.S. at 628.

> The harms we recognized in *Powers [v. Ohio,]* are not limited to the criminal sphere. A civil proceeding often implicates significant rights and interests. Civil juries, no less than those of their criminal counterparts, must follow the law and act as impartial factfinders. And, as we have observed, their verdicts, no less than those of their criminal counterparts, become binding judgments of the court. ***Racial discrimination has no place in the courtroom, whether the proceeding is civil or criminal.***

Edmonson, 500 U.S. at 640 (emphasis added) .

3. *Edmonson* Demonstrates That Automatic Reversal Is Always Required Whenever Racial Discrimination Taints the Trier of Fact in a Civil Case.

Having held that the *Batson* rule against purposeful racial discrimination in jury selection applies in the civil context as well as the criminal, the *Edmonson* Court said nothing to indicate that other components of *Batson* such as the rule of per se reversal were somehow inapplicable. Instead, speaking to the nature of the judicial inquiry to be conducted when determining whether the motive for exclusion of the juror was a racial one, the Court noted that in *Batson* it called for "consideration of all relevant circumstances" and "[t]he same approach applies in the civil context . . . ." *Edmonson*, 500 U.S. at 631. Logically, then, race

discrimination infecting the jury selection process is a type of structural error which triggers a per se rule of reversal in the civil arena, just as it does in a criminal case.

Moreover, a few courts have explicitly recognized that what might be termed "*Edmonson* error" is structural error which is never subject to harmless error analysis. In *Alex v. Rayne Concrete Service*, 951 So. 2d 138 (La. 2007), the appellate court found that the trial court erred in allowing the defendant to exercise a peremptory challenge because the reason given was a sham and the true motive was to remove an African-American juror. Although there had already been three jury trials in the case, the Louisiana Supreme Court held that the racial discrimination in the selection of the jury in a civil case "is a structural error," *id.* at 155, and that a fourth trial was required. The Court rejected the defendant's contention that the such discrimination errors could be subjected to harmless error analysis, citing to *Vasquez v. Hillery, supra. Id.*

> In the present case, it cannot be gainsaid that this matter has already been tried to three separate juries and that because of that procedural history, under *most* circumstances it may have been appropriate for the appellate court to conduct a *de novo* review. [Citation]. However, ***in light of the structural error involved, the impact on the excluded juror, and the harm to our system of justice, consideration of judicial economy must yield to the greater legal principles involved*** . . . . Therefore, this matter is remanded to the trial court for a new trial.

Rayne Concrete Service, 951 So. 2d at 156 (emphasis added).

4. The Decision in *In re Detention of D.F.F.* Is Not Controlling on Structural Error Analysis.

Petitioner recognizes that after his petition for review was granted, this Court rendered a decision in *In re Detention of D.F.F.*, 172 Wn.2d 37, 256

P.3d 357 (2011) in which a majority of the Court seemed to reject the notion that there could ever be such a thing as structural error in a civil case. This may be why amici are hesitant to endorse Petitioner's view that the error in this case should be deemed structural error. But there are at least three reasons why *D.F.F.* is not controlling in this case.

First, the error committed in that case was a violation of *state* constitutional law, *not* federal constitutional law.[8] In that case, the error was closure of a civil commitment hearing in violation of the Washington Constitution, art. 1, § 10 right to the open administration of justice. This court is the final arbiter of the Washington Constitution and can adopt its own rules as to how violations of state constitutional rights should be analyzed by appellate courts. But the U.S. Supreme Court is the final arbiter of the federal constitution. From *Vasquez* to *Batson* to *Edmonson*, the Supreme Court has consistently held that violations of the federal constitutional guarantee of racial equality are structural errors which can never be held harmless. Since the U.S. Supreme Court has refused to differentiate between civil and criminal cases where race discrimination has tainted the proceedings, this Court must apply the rule of automatic reversal that the U.S. Supreme Court has always applied whenever race discrimination in violation of the Equal Protection Clause has been found.

Second, since there was no claim of race or national origin discrimination in the *D.F.F.* case, those parties had no reason to bring the

[8] That is why *Edmonson* and its progeny were not cited in the briefing for *D.F.F.*

line of cases treating race discrimination violations as structural error to the attention of this Court, including *Edmonson* in the civil context. Since there was no occasion to bring the special status of such constitutional discrimination violations to this Court's attention, it would be wrong to treat *D.F.F.* as foreclosing the possibility that this Court would recognize the existence of structural errors in civil cases where the error committed did involve discrimination on the basis of race or national origin.

And ***third***, *D.F.F.* did not involve a case where the error committed cast doubt on the constitutional right of the appellant to receive a fair trial. In *Batson* and *Edmonson*, the racial discrimination had the effect of skewing the composition of the jury which tried the case. In the present case, the error in question – the trial judge's determination that profiling evidence would be of assistance to her in deciding the case – casts doubt on whether the judge was an impartial decision maker, and could preside with the appearance, as well as the substance, of impartiality.[9] A judge who thinks it will help to consider profiles which indicate that people whose country of national origin is not the United States of America are more likely than native-born Americans to commit the crime of child abduction, has neither.

For all of these reasons, *D.F.F.* does not foreclose the possibility of adopting the rule that race and national discrimination errors of

[9] "Among those basic fair trial rights that can never be treated as harmless is a defendant's right to an impartial adjudicator, be it judge or jury." *Gomez v. United States,* 490 U.S. 858, 876 (1989); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) ("No matter what the evidence was against him, he had the right to have an impartial judge.").

constitutional magnitude should be deemed structural errors which always require reversal of the decision below.

B. A Judge Cannot Be Presumed to Have Ignored Discriminatory Profiling Evidence in a Case Where the Judge Announced on the Record That She Found the Discriminatory Evidence Helpful and Referred to It in Her Findings of Fact.

1. When a Judge Overrules an Objection to Evidence in a Bench Trial, an Appellate Court Cannot Presume That the Judge Ignored That Evidence Because It Was Inadmissible.

The ACLU *Amicus Curiae Brief* discusses the Court of Appeals' erroneous reliance on the axiom that in a bench trial it is presumed that the trial judge ignored any inadmissible evidence which was admitted. *ACLU Brief,* at 17-18. As the ACLU properly notes, it makes sense to apply this presumption when the trial judge is silent and expresses no opinion as to whether certain evidence was admissible or not. In this situation, since a trial judge is presumed to know the law, it can generally be inferred that the trial judge did not consider, for example, an inadmissible lay opinion. *See, e.g., State v. Read*, 100 Wn. App. 776, 786, 788, 998 P.2d 897 (2000), *aff'd* 147 Wn.2d 238, 53 P.3d 26 (2002).[10]

For example in *State v. Melton*, 63 Wn. App. 63, 817 P.2d 413 (1991), the case cited by the Court of Appeals, two juveniles were tried together in Juvenile court before the same judge. Defendant Melton was concerned that the judge would consider statements of codefendant Harvego which

[10] The Court of Appeals in *Read* noted that some lay witnesses "appear to have crossed the line" when they opined that there was no need for the defendant to use force to defend himself. No objections were made to the admission of these opinions. Because judges know that lay opinions as to the guilt of the defendant are not admissible, it could be presumed that the trial judge did not consider this opinion testimony.

implicated Melton. At trial the prosecutor used a redacted statement from which all of Harvego's statements about Melton had been stricken. But Melton was concerned that during trial Harvego's attorney was circumventing these redactions through the use of aggressive questioning of a detective in such a way as to elicit the statements which had been redacted. The Court of Appeals noted that some of the questions did seem to elicit inadmissible testimony, the trial judge *sustained* Melton's objections to these questions. *Melton,* 63 Wn. App. at 68.[11] Therefore, it could quite easily be inferred that the trial judge did not consider this evidence, since he ruled it was not admissible.

In marked contrast, in the present case the trial judge *overruled* Brajesh's objections to the testimony of Michael C. Berry, a so-called expert who was proffered to testify "about . . . the profile of persons . . . who are likely to abduct." *Katare III, Slip Opinion* at 5. The trial court ruled that Berry's testimony would "assist it in understanding the literature on international child abduction submitted as exhibits." *Id.* at 10. It then issued an order which specifically determined that Brajesh "meets the criteria for several profiles and 'red flags'" to which Berry had testified. *See* CP 156, bullet 4. Under these circumstances, there cannot be any

[11] "Although some inferences regarding Melton's role in the shooting may have been implied by these questions, Melton's objection to each question that purported to bring in information from the excised portion of the statement was sustained by the trial court. A trial judge is presumed to be able to disregard inadmissible evidence, thus avoiding any prejudice to the defendant."

presumption that the trial court ignored evidence which it specifically stated it was going to consider.

2. Judges Are Not Immune to Prejudice.

It is also particularly significant that this Court has reserved ruling on the question of whether the bench trial presumption that the trial judge did not consider inadmissible evidence applies to errors of constitutional magnitude. *State v. Read,* 147 Wn.2d at 242. In this case the admission of profiling evidence *is* error of constitutional magnitude because discrimination on the basis of ancestry or national origin generally violates the Equal Protection Clause absent a showing that such discrimination satisfies strict scrutiny.

It is simply not tenable to maintain that judges are superhuman and that they can never succumb to discriminatory prejudices. *See, e.g., State v. Smulls*, 935 S.W.2d 9, 25-27 (Mo. 1996), *cert. denied.*, 520 U.S. 1254 (1997) (where there is an objective basis for a reasonable person to doubt the racial impartiality of the trial court the judge is required to recuse because the proper focus is on the "rights and due process-based expectations of the parties" to satisfy the appearance of justice.)[12] The

[12] The Missouri Supreme Court explained, 935 S.W.2d at 27:

> The reasonable-person, objective standard we employ is not hypersensitive. It merely acknowledges the fact that prejudice is most often subtle, sometimes masquerading in superficially neutral language. No one would dispute that a judge should never use words or terms that suggest racism. Where there is ambiguity, the Court's obligation is to construe language in favor of assuring the appearance of fairness to the litigants because "justice must satisfy the appearance of justice." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986).

Supreme Court thus requires that the legal system satisfy the appearance of fairness:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. . . . Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way justice must satisfy the appearance of justice.

In re Murchison, 349 U.S. 133, 136 (1955) (citations and quotes omitted). Washington law is consistent. *See, e.g., In re Marriage of Muhammed,* 153 Wn.2d 795, 807, 108 P.3d 779 (1999) (appearance of fairness required remand to different judge); *Sherman v. State*, 128 Wn.2d 164, 205-06, 905 P.2d 355 (1995) (same); Brajesh's Opening Brief, pp. 57-61; Brajesh's Reply Brief, pp. 12-15.

C. An Appreciation for the Culture of Another Country Cannot Be Equated With a Propensity to Use That Country as a Safe Haven for Criminal Activity.

The trial judge employed a strain of logic which, when closely examined, does reveal the influence of a cultural bias which expresses itself in a form of judicial discrimination on the basis of national origin. Ultimately, the trial judge justified the travel restrictions she placed upon Petitioner by reasoning that such restrictions were the lesser of two evils. On the one hand she concluded that if the Petitioner were to take his children to India, he was *not* likely to abduct them and to prevent their

return to their mother, the custodial parent. VI RP 10.[13] Nevertheless, the trial court concluded "if I'm wrong about this the consequences can be incredibly serious." VI RP 10-11. Since the evil of child abduction was such a large evil, the trial court chose to prohibit him from traveling abroad with his children because the evil of restricting Petitioner's parental rights seemed to her to be a much lesser evil, while failing to even take into account the children's need to know the Indian half of their family and culture.

This kind of logic simply ignores the constitutional command there must first be some proof "that some harm threatens the child's welfare before the State may constitutionally interfere with a parent's right to rear his or her child." *In re Custody of Smith,* 137 Wn.2d 1, 15, 969 P.2d 21 (1998), *aff'd sub nom, Troxel v. Granville,* 530 U.S. 57 (2000). It is not sufficient that the harm feared is a very big harm; there must be evidence that the potential harm is actually likely to materialize. *Marriage of Watson,* 132 Wn. App. 222, 234, 130 P.3d 915 (2006).[14] The evil of sexual molestation of a child is an enormous evil. Forbidding a parent to possess or to read pornographic magazines such as Playboy is, by

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[13] "I am not persuaded, based on all of the evidence presented, including that of the expert witnesses who were called to testify, that Mr. Katare presents a serious threat of abducting the children."

[14] In *Watson* the trial court restricted the father's visitation based on the mother's fears he would sexually abuse his daughter. Division II reversed and vacated the restrictions because "the ***unproven allegation*** of sexual abuse ***does not provide substantial evidence*** in support of the visitation restrictions. Moreover, . . . [the father's] failure to disprove the sexual abuse allegation is not substantial evidence that his involvement or conduct will adversely affect" his daughter. 132 Wn. App. at 233-34 (emphasis added).

comparison, a much smaller evil. But it is also an activity protected by the constitution. Thus, even if some expert opines that reading adult pornography is a risk factor that makes a parent fit the profile of a person more likely than others to molest a child, a court still may not forbid the parent from reading such magazines simply because the magnitude of the harm to be prevented is so large. If courts could employ this kind of logic, they could indefinitely incarcerate every person convicted of a misdemeanor assault on the grounds that people with such prior convictions fit a profile of those people who commit murder.[15] That is why the operative statute, RCWC 26.09.191(3)(g) has been construed to require a nexus between ***parental*** conduct (not a mere profile) that is established or proven to be probable by substantial evidence before the restrictions on a parent can be imposed. The fear of one parent is not enough, even if sincere.

Despite the constitutional prohibition against "playing it safe" by drastically curtailing the exercise of constitutionally protected freedoms so as to avoid really big harms that "might happen", that is exactly what the trial court did in this case. And it is may well be that bias against those with ties to another country (particularly when that country is not in Europe and has a distinctly non-European culture) is what caused the trial court to impose restrictions on Brajesh's constitutionally protected

[15] The *Korematsu* case is based on precisely this kind of logic. There was no evidence to indicate that any particular Japanese-American was likely to engage in sabotage. But under the influence of the nagging worry of "what if we're wrong" the big evil of sabotage does materialize, the country chose to lock up thousands of innocent people.

parental freedom to take his children to another country so that they can learn about their ancestral heritage; and whether that is the case or not, it could certainly appear that way to a disinterested observer, thus failing the appearance of fairness test and undercutting faith in the legal system.

Over one billion people live in India, including the grandparents and cousins of Brajesh's children. The culture of India is many thousands of years old, whereas the culture of the United States is only a tad more than two centuries in the making. The mere fact that Brajesh Katare appreciates the culture of a country which has given the world the religion of Buddhism, the civil rights political tactics of Mahatma Gandhi, the beauty of the Taj Mahal, the literature of the Rig Veda and the poetry of Rabindranath Tagore, is not a "reason" to prohibit him from taking his children to the country of his birth. On the contrary, the implicit assumption that anyone who would value the culture of such a blatantly "non-American" place like India is simply a manifestation of a bias which has been consistently recognized as presumptively unconstitutional since this country came to its senses and began to express regret for what it did to Japanese-Americans in the middle of a world war. But we are not at war with India, and we have supposedly learned the lesson that not even war justifies this kind of discrimination.

D. The Proper Remedy Is to Strike the Unsupported Passport Controls and Travel Restrictions and Permit the Children to Visit Their Family in India.

Both *amicus* briefs cite and quote cases which, when they found error was not harmless, ordered a new trial. For those cases, their contexts

made that an appropriate remedy for the improperly admitted evidence. However, in this case, remanding for a fourth hearing or trial would not be a proper remedy for at least three reasons. ***First,*** after striking the April, 2009 orders, this court can review the untainted evidence in the record against the proper standard and determine that the standard is not met. Indeed, even the trial court did not meet that standard with its findings based on the *tainted* evidence, as it never found that Brajesh was likely to abduct or would probably abduct the children.[16] ***Second,*** Respondent Lynette has had three attempts to establish that Brajesh is likely to abduct the children and has failed.[17] In America the rule is, three strikes and you are out.

Finally, remand for a new hearing would be fundamentally unfair to not only Brajesh but, as pointed out in the *Korematsu Center Amicus Brief*

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[16] The most order says is there is "sufficient risk of abduction" to impose the restrictions, without ever quantifying what that risk is. *See* CP 153, 156. In particular, CP 156, bullet #4 states that the evidence "shows he meets the criteria for several profiles and 'red flags' which indicate a risk of abduction by the father, which is against the best interests of the children." But nowhere does this or any finding say that Brajesh is ***likely*** to abduct; or that it is ***probable*** he will abduct if not restrained, *i.e.*, that the restrictions are necessary to prevent a known, likely harm. Even under the 2009 order tainted by the racial profiling evidence, the assessment is no more than speculation.

[17] The history of this case and Brajesh's conduct demonstrate there is no likelihood of abduction by him or any other violation of the parenting plan orders. For all his sophistication in international travel that was asserted as a negative against him and giving him more opportunity to abduct, the fact is that, in the eight and a half years since the trial in 2003, Brajesh has obeyed every court order even when he disagreed with them, until he got it reversed by the appellate court; has spent over $250,000 in legal fees pursuing his rights as of the argument after the 2003 trial and up to the Court of Appeals argument in May, 2010; has never been held in contempt in the long history of this case, nor ever been arrested for any offense; and has pursued removal of the restrictions through the legal system without ever seeking to interfere with or diminish Lynette's time with the children. Brajesh has ***only*** sought to have freedom of travel with the children during his visitation time, while they are children, a time quickly vanishing.

at pp. 18-20, even more so to the children. After all, the children have an interest in going to India. And the *only* evidence in the record is that such visits are an important, positive element in their psychological development. A new hearing would further delay their psychological development and learning more fully the Indian part of their racial and cultural background when no evidence in this record establishes that visiting their relatives in India would in any way be "adverse to the best interests of the child[ren]," as is required under the statute and case law. RCW 26.09.191(3); *In re Marriage of Watson*; *In re Marriage of Wicklund*, 84 Wn. App. 763, 770, 932 P.2d 652 (1997). Rather, the only evidence is the opposite.

III. CONCLUSION

The briefs of *amici curiae* are correct as far as they go that the Court of Appeals failed to properly analyze the impact of the improper admission of, and reliance on, the inadmissible racial profiling evidence by the trial court and the kind of scrutiny to which it should be subjected. Their suggestion that *at the very least* the constitutional harmless error test must be applied and that such a standard cannot be satisfied on this record is sound. But as Brajesh pointed out, error of this nature is so antithetical to the operation of our courts that it should be considered structural error under *Edmonson* and its progeny, and that this application in a civil context is both required under *Edmonson* and is not precluded by any of the analyses in *D.F.F.*

Under the circumstances of this case, ongoing since 2003; and where there is ***no*** evidence that the children would be harmed by visits to their relatives in India but ***only*** evidence that such visits would enhance if not also be necessary their balanced psychological development; and where there is no basis for finding that Brajesh, in 2009 (much less in 2011 or 2012) would probably abduct the children to India and not return them despite his consistent adherence to the rule of law and following the orders that have been entered; where the children get older each day and have now ***both*** completed over half their childhoods; the proper remedy is a decision that strikes the April, 2009 rulings in their entirety and which also directs that the passport controls and international travel restrictions in the underlying 2005 parenting plan be stricken.

Respectfully submitted this 2nd day of November, 2011.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 2nd day of November, 2011, I caused a true and correct copy of the foregoing document to be delivered to the following persons:

Washington Supreme Court Attn: Ronald R. Carpenter, Clerk Temple of Justice Bldg. Olympia, WA 98504 P: (360) 357-2077 Fax: (360) 357-2102 Email: supreme@courts.wa.gov	☐ U.S. Mail, postage prepaid ☐ Messenger ☐ Fax ☒ E-filing
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Dated this 2nd day of November, 2011 at Seattle, Washington.

Patti Saiden

Patti Saiden, Legal Assistant